

No. 1564

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

ELIZABETH DECKER,

Appellant,

vs.

PACIFIC COAST STEAMSHIP COMPANY
(a corporation),

Appellee.

APPELLEE'S REPLY BRIEF.

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Filed this.....day of July, A. D. 1908.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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Permission having been granted to the appellee, by this court, to reply to any new matter raised in appellant's reply brief, the appellee now desires to call the court's attention to only three questions, namely:

FIRST: To appellant's misconception of her right to sever her right of ingress and egress from her upland to deep water navigation.

SECOND: To her contention that there is any difference in the locus in quo between the time of her conveyance to the People's Wharf Company and the date of the commencement of this action.

THIRD: To the fact that her littoral rights, by virtue of owning land abutting on the shore, attached to the upland at the date of the townsite entry, to wit, October 13, 1893.

Referring to the first question which we desire to discuss, we wish to call the court's attention to page 2 of appellant's reply brief and the quotation from Farnham on Waters contained therein, as follows:

“But if the title to the bed of the water is in the state, so that the right to wharf out is merely the right of the riparian owner as one of the public to make use of the common property, the owner of the upland has no interest which can be separated from the land, but the right depends exclusively upon the ownership of the shore.”

The appellant bases her contention that she was without authority at the time she executed her deed to the People's Wharf Company on the above quotation from Farnham. It is true that the tide lands in the District of Alaska belong to the United States, and under the authorities, all tide lands in territories are held by the United States in trust for the future state, and consequently, no one can acquire any rights in the tide lands of Alaska as against the United States. The owner of the abutting upland has no interest in the *tide lands*, but he has a *right of ingress and egress* from his upland to deep water. He has no right to construct wharves on the tide lands as against the United States, and, therefore, can convey no such right to any one else, but he has the power to convey his right of ingress and egress. This court held in *re Western Pacific R'y Co. v. South-*

ern Pacific Co., reported in 151 Fed. page 376, that the upland owner has no right to build wharves or piers on the tide land, in front of his upland, but he has *a right of way*, from his upland to deep water, which the law protects. We quote the following, on page 390, from the opinion rendered by this court in *re Western Pacific R'y Co. v. Southern Pacific Co.*, supra :

“It may be said, in general, that such owners have the right of access to the channel or navigable part of adjacent waters, unless prevented by improvements made under the constitutional authority vested in Congress. But the question of the right of access, strictly so-called, is not necessarily here involved. The right which the appellee claims, and which was accorded it by the court below, is the right to wharf out to navigable water. At common law no such right attached to the owner of shore lands.”

It is evident that the court draws a distinction between the right of access to navigable water and the right to construct a wharf in front of one's upland holding. The tide lands belong to the United States, and no one has the right to appropriate the same as against the United States, but it is the policy of the government to allow such appropriation so long as the same does not interfere with commerce and navigation. The right which the upland owner has in the tide lands in front of him is merely the right of way over the same to deep water navigation. One can certainly convey such a right of way for a valuable consideration and thereby estop himself from subsequently asserting claim to the same. In this case, the appellant, by her deed to the People's

Wharf Company (Tr. pages 55 and 56), conveyed all of her littoral and riparian rights which she then had, or which she might subsequently acquire, to the People's Wharf Company. That conveyance was made on the 20th day of February, 1897. The People's Wharf Company and its successors in interest expended large sums in improving and constructing wharves and otherwise improving said property. It is not contended by the appellant that she did not understand the force and effect of the conveyance that she then made. We cannot understand how she can now seriously invoke the power of a court of equity to undo what she then did by her conveyance and thus confiscate the property of innocent purchasers.

With reference to our second contention herein, we wish to call the court's attention to pages 10 and 11 of appellant's reply brief, wherein it is contended that at the date of the execution of the conveyance from the appellant to the People's Wharf Company, her upland abutted on Franklin Street, but at the date of the commencement of the suit, it abutted on Gastineau Channel, and counsel for appellant contends that because it is admitted in the pleadings (Tr. p. 3) "that said premises " abut on the waters of Gastineau Channel at mean " high tide, and against which premises the tide regu- " larly ebbs and flows twice in twenty-four hours", and because her deed to the People's Wharf Company states that her upland abuts on Franklin Street, therefore, her holdings have undergone a change during the time intervening between her conveyance to the People's Wharf Company and the bringing of this action. That is, that

at the time of the bringing of this action, her upland holdings at mean high tide abutted on tide water, and therefore she now has littoral and riparian rights; but at the time of her conveyance to the People's Wharf Company her upland abutted on Franklin Street, and therefore she then had no littoral rights. But we insist that it is only necessary to read the deed of the appellant and others to the People's Wharf Company, found on pages 55 and 56 of the record, to appreciate the absurdity of appellant's contention. Quoting from that deed, found on page 56 of the transcript, we find the following: "and we do, as the owners of said lots K and L, the same abutting on Franklin Street, in said city, the said street running along the line of ordinary high tide, and being the shore of said Gastineau Channel, in said town of Juneau". The language just quoted clearly shows that Franklin Street is on tide land and that it abuts on the front of appellant's lots K and L. The language of the deed states, "the same", that is the street, "being the shore of said Gastineau Channel, in said town of Juneau".

"The tract of land designated as shore, which may be a parcel of a manor but is prima facie in the Crown, is that strip lying along tide water over which the tide flows between the line of ordinary high tide and the line of lowest tide."

Farnham on Waters, Vol. I, Sec. 45 (c).

There is nothing in the record to show that Franklin Street was ever anywhere else except on the tide land in front of the appellant's property, blocks K and L.

The only remaining question which we desire to discuss in this reply brief is the question as to whether appellant became entitled to any littoral rights by virtue of her interest in blocks K and L.

The townsite of Juneau was entered on the 13th day of October, A. D. 1893, and appellant and her grantors were then in possession of the upland abutting on the tide land in controversy (Tr. page 53). It is a well settled rule of law that the interest of the occupants of a townsite accrue at the date of the townsite entry, and that any one in possession of land at the date of the entry is entitled to a patent, or a trustee's deed, for the land. Whatever littoral rights any occupant may have by virtue of ownership of upland, he acquires at the time of the date of the townsite, and the subsequent issue of patent to the townsite and a trustee's deed to him cannot enlarge or increase such littoral rights; in fact, it has been held that one in possession of uplands, in good faith, in the District of Alaska, takes the same littoral rights as are incident to ownership in fee.

Lewis v. Johnson, 76 Fed. page 476.

In the case last cited, the court did not base its ruling on the fact that the townsite of Juneau had been entered, but held that the possession, in good faith, of upland, gave to such upland owner all littoral rights which he could possess had he a fee simple title to the land. However, the appellee need not rely on the holding in the last case cited, for the reason that it is conceded, as before stated, that the townsite of Juneau was entered on the 13th day of October, 1893, and that appellant was in

possession of the land at that time, while she did not deed the property in controversy to the People's Wharf Company until the 20th day of February, 1897 (Tr. pages 55 and 56). We submit that it is a universal rule of law, to which there is no exception, that those in possession of property within a townsite, at the date of the entry, acquire by virtue of such possession an indefeasible right to a patent to that land; and that the issuing of patent subsequently is a mere ministerial act, and confers upon the occupant no greater rights concerning the property and no greater interest in the same than he had acquired by virtue of his occupancy on the date of the entry of the townsite.

- Ashby v. Hill, 119 U. S. p. 529;
- Cofield v. McLellan, 16 Wallace p. 334;
- Stringfellow v. Cain, 99 U. S. p. 610;
- Simons v. Wagner, 101 U. S. p. 260;
- Barnay v. Dolph, 97 U. S. p. 656;
- Cornelius v. Kessel, 128 U. S. 456;
- Lewis v. Campbell, 29 L. D. p. 357.

Through an oversight in our brief in chief (see page 11 thereof), we stated that a trustee's deed had been issued to appellant on the 13th day of October, 1893; that mistake, however, is immaterial for the reason that the townsite of Juneau was entered on the 13th day of October, 1893, and the appellant acquired at that time such an interest in the upland as to entitle her to all littoral and riparian rights which she could acquire were she then the owner of the upland in fee; consequently, when she executed her deed to the People's Wharf Com-

pany, in February, 1897, she conveyed all the littoral rights that the owner of the upland could have acquired, and by such deed estopped herself from thereafter denying the right of the People's Wharf Company, and its successors in interest, to occupy the tide land in front of her premises for wharf purposes, and in whatever manner they chose.

It seems to us, therefore, that the decision of the lower court should be upheld for all of the reasons stated in the opinion of the trial judge, which are substantially as follows:

(1) That it conclusively appears from the evidence that appellant has sued the wrong party, for the undisputed evidence shows that the Pacific Coast Company is the owner of the premises in controversy, and maintains, and has maintained at all times since and prior to the commencement of this action, the structures and buildings of which the appellant complains.

(2) That appellant conveyed all of her right, title and interest in and to the premises in controversy to the grantors of the Pacific Coast Company long prior to the commencement of this action

(3) That the appellant's failure to assert her right to the premises in controversy during a period of ten years, and during which time she permitted the Pacific Coast Company and its grantors to incur large expense in improving the property, without protest, estops her from now questioning the right of the Pacific Coast Company, or its lessee, to occupy the premises in whatever manner they see fit.

And we submit that any of the foregoing reasons is sufficient to warrant this court in affirming the judgment of the trial court.

Respectfully submitted,

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Steamship Company.*

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